

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TISHEAM AZSEAM MCADOO,

Defendant-Appellant.

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UNPUBLISHED

December 23, 2003

No. 242214

Wayne Circuit Court

LC No. 01-005870-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and sentenced to a prison term of twenty to fifty years. (Appendix A.) He appeals as of right. We affirm defendant's conviction and sentence, but remand for completion of a sentencing information report departure evaluation.

**I. Facts**

Defendant's conviction arises from allegations that, at approximately 7:00 p.m., on April 25, 2001, defendant and an unidentified accomplice approached the complainant and stole his 1996 Ford Explorer SUV. The fifty-one-year-old complainant testified that, en route to his parents' house, he stopped and talked to a neighbor through the passenger side window of his SUV. As he was talking, he looked into his driver's side rearview mirror and saw two men approaching the driver's side door. When the men came to the driver's side window, the neighbor ran to obtain help. According to the complainant, the first man, whom the complainant identified as defendant, tried to open the driver's door, while the second man pulled out a gun and pointed it at the complainant through the windshield. The men directed the complainant to "get the fu\*\* out of the truck." The complainant indicated that, because the gun was pointed directly at him, he opened the door, got out, and walked a few feet from the SUV. The complainant indicated that, while he was standing outside of the SUV at gunpoint, defendant ripped his jacket pocket looking for valuables. The complainant then observed defendant go toward the SUV. Thinking the gunman was going to shoot him, the complainant attempted to grab the gun and a tussle ensued. At that point, the complainant indicated the defendant came back and punched him in the face with his fists several times, breaking several of his teeth. (Tr II, pp 20-29, 37, 40-44.) The complainant testified that he then ran, and the two men left together in his SUV. The complainant provided a detailed description of defendant to the police, and was thereafter taken to the hospital.

On May 4, 2001, the complainant identified defendant in a lineup, and stated at trial that he was one hundred percent certain that defendant was the person who carjacked him. (Tr II, pp 30-32, 34, 37.) The police recovered defendant's SUV approximately five weeks after the incident (Tr II, p 33.)

Detroit Police Officer Dion Peoples testified that, on May 4, 2001, after waiving his *Miranda*<sup>1</sup> rights, defendant gave a written statement, which was admitted at trial. The statement, which was read into the record, provided:

Me and Pete were riding down West 7 Mile, when Pete said, I see a nig\*\* sleep, so he turned around and parked. He jumped out, and I followed.

He approached the driver's side door, opened it, and was on the driver. I ran to help him. I grabbed the man in the truck, pulled him out, while Pete and the man tussled. I was digging through the truck, trying to find money and valuables.

While I was doing that, Pete ran to the passenger's side of the door and told me to pull off, so I did drive off in the man's Ford Explorer truck. [Tr II, pp 81-82.]

Defendant testified at trial. He denied any involvement in the offense. He indicated that, although he gave the May 4 statement, it was false, and the result of the police promising him that he could see his daughter if he gave a statement. (See, e.g., Tr II, pp 145-148.)

## II. Sentencing

Defendant first argues that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 81 to 135 months (or 6.75 to 11.25 years) and sentenced him to twenty to fifty years' imprisonment for his carjacking conviction. (See Appendices A and B.) We disagree.

### A. Standard of Review

Under the sentencing guidelines statute,<sup>2</sup> the trial court, in most instances, must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A court may not depart from the sentencing guidelines range based on certain

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> Because defendant committed the offenses after January 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

The Supreme Court has recently reiterated that the phrase “substantial and compelling” constitutes strong language intended only to exist in “exceptional cases.” *Babcock, supra* at 257-258 (citation omitted). The reasons justifying departure should “keenly and irresistibly grab” the court’s attention and be recognized as having “considerable worth” in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Babcock, supra* at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court’s determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the recommended minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274; see also *Armstrong, supra* at 424. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Babcock, supra* at 274. In ascertaining whether the departure was proper, this Court must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

## B. Analysis

In this case, the trial court did not file a departure evaluation form, but did state its reasons for departure on the record:

The record will be very clear, [defendant], if we did not have the sentencing guidelines in place, given your prior conduct reflected in the other conviction, and your conduct in this case, I would impose a sentence of life imprisonment; without reservation. So the record is clear.

There are a number of reasons I believe that I can justify exceeding the sentence guidelines.

The sentence guidelines say that I should give you a minimum period of imprisonment of no more than 11 years and three months.

And, that is wholly inadequate.

The guidelines do not take into account your extraordinary arrogance that you demonstrated when you testified in this case.

The guidelines do not take into account the fact that you lied on the witness stand.

The guidelines do not take into account the Judge's perception of the fact that you are dangerous to this community.

Now, 50 points can be given, under the guidelines, for Aggravated Physical Abuse.

I think the attorneys would agree - - and I would agree - - the facts are just a bit short of being able to demonstrate that.

But you gratuitously injured [the complainant] in this case.

"Terrorism" is defined under that Offense Variable as, conduct meant - - designed to substantially increase the fear and anxiety a victim suffers during the offense.

So, literally translated and understood, I guess we could include that [the complainant] was subjected to Aggravated Physical Abuse.

What I'm saying is, that the guidelines are all or nothing, when it comes to that Offense Variable; it's either 50 points, or 0.

What happened here should be somewhere in between, which would hike the guidelines.

Also, the guidelines give 10 points for being a leader; 0 points for not being a leader.

And, again, [defendant] both in this instance and the other carjacking, somewhere in between. These were partners in robbery.

And, again, the Offense Variable there is all or nothing.

It should be something there that say, when people are co-participants in this kind of incredibly dangerous conduct - - at some point - - should be ascribed.

So, for all those reasons, I feel that the guidelines are not adequate.  
[Appendix B.]

Initially, we find that the trial court's first two articulated reasons for departure, i.e., that, when testifying at trial, defendant was both arrogant and untruthful, are either not objective and verifiable, or not substantial and compelling. There are no objective manifestations that can be ascertained with any degree of certainty on appeal that defendant was "arrogant" when he testified at trial, nor is it remarkable that a defendant accused of a heinous crime would categorically deny any culpability at trial. Accordingly, neither of these articulated factors provide a basis for departing from the sentencing guidelines range.

However, we find that the trial court relied on other factors that are objective and verifiable, and that the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines. The trial court's stated reasons for departure relating to defendant's superfluous infliction of physical abuse upon the complainant, defendant being "dangerous to the community," and defendant's copartner role in "this kind of incredibly dangerous conduct" are all objective and verifiable. Further, although the trial court noted that the facts in this case did not rise to a level where points could properly be assessed under offense variable ("OV") 7 (aggravated physical abuse) for terrorism, MCL 777.37(1)(a),<sup>3</sup> or under OV 14 (offender's role) for being a leader in a multiple offender situation, MCL 777.44, the trial court did not err by finding that the guidelines did not adequately account for the offense and offender characteristics that were unique to this carjacking case. Not only did defendant and his partner point a gun at the complainant and steal his SUV, but, after the complainant exited the car, defendant punched him in the face several times, knocked out four of the complainant's teeth, and "busted" his nose. As a result of defendant's ruthless attack, the complainant received several stitches in his lip, and was hospitalized overnight. Moreover, within two hours after beating the complainant and stealing his SUV, defendant and his partner used the complainant's SUV to carjack and rob another victim.<sup>4</sup> (Tr II, pp 20-29, 40-44; S Tr, p 11; SIR, lower court file.)

In short, the objective and verifiable reasons justifying departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of defendant's sentence. For the same reasons, we also conclude that the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272.

Although two of the reasons articulated by the trial court are not substantial and compelling, remand for resentencing is unnecessary. Our Supreme Court recently explained that if a trial court articulates multiple reasons for a departure, and this Court determines that some of the reasons are invalid, we must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Babcock, supra* at 260, 273. If this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for rearticulation or resentencing is necessary. *Id.* at 260-261. Here, having reviewed the record and scrutinized the sentencing transcript, we are

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<sup>3</sup> As it relates to this case, MCL 777.37(1)(a) directs a score of fifty points if the victim was "treated with terrorism, sadism, torture, or excessive brutality." At the time of defendant's 2000 offense, terrorism was defined in MCL 777.37(2)(a) as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." This statute was amended in 2002 to remove the "terrorism" language. See 137 PA 2002.

<sup>4</sup> As a result of this additional conduct, following a separate jury trial, defendant was convicted of carjacking, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appealed, and this Court affirmed his convictions in *People v McAdoo*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2003 (Docket No. 240002).

satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone. Accordingly, remand for resentencing is not warranted.

We also note that, although the trial court articulated its reasons for departure on the record, it failed to complete the required sentencing information report departure evaluation. *Armstrong, supra* at 425. We therefore remand the case to the trial court in order for it to perform the ministerial task of completing a departure evaluation. *Id.* at 426.

### III. Request for Substitution of Trial Counsel

Defendant next argues that the trial court abused its discretion by denying his request for substitute counsel. To support this claim, defendant complains that he and defense counsel had insufficient time to communicate, resulting in defense counsel being unprepared and unaware of motions that defendant wanted to file, and witnesses who he wanted to call. (See, e.g., Tr II, pp 4-5; Tr III, pp 23-24.)

#### A. Standard of Review

A trial court's decision regarding substitution of counsel is within the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).<sup>5</sup>

An indigent defendant is constitutionally guaranteed the right to appointed counsel. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). But an indigent defendant "is not entitled to counsel of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack, supra*. Rather, appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), citing *Mack, supra*. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* But disagreements fairly characterized as matters of professional judgment or trial strategy do not justify substitution of counsel. *Traylor, supra* at 463. Moreover, a defendant's mere allegation that he lacked confidence in trial counsel is not good cause to support substitution. *Id.*

#### B. Analysis

Our thorough review of the record demonstrates that defendant did not establish good cause to support his request for substitute appointed counsel. While the record reflects defendant's dissatisfaction with the general manner in which his case was being handled, defendant failed to make any showing that there was a legitimate disagreement with his counsel

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<sup>5</sup> In reviewing this issue under an abuse of discretion standard, we note that, although defendant's "request" for substitute counsel was imprecise, the trial court did specifically respond to defendant's general complaints as if he had requested new counsel. (See, e.g., Tr I, p 4; Tr II, pp 8; Tr III, pp 22-24.)

over fundamental trial tactics. *Mack, supra*. Rather, our review of the record convinces us that defendant's dissatisfaction with defense counsel involved no more than alleged communication difficulties and disagreements on certain matters of trial strategy that fall short of establishing good cause for substitution.<sup>6</sup>

To the extent that defendant desired more communication with counsel, both the trial court and defense counsel noted that defendant declined the offer to remain in the local jail pending trial so that defense counsel could have more contact with him, and instead chose to return to prison, which contributed to the communication problems between defendant and defense counsel. (See Tr I, pp 3-4; Tr II, pp 5-6.) "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983); see also *Traylor, supra* at 462. Further, even if defense counsel did spend little time with defendant, there is no indication that defendant was prejudiced. There is no indication that a complete breakdown of the attorney-client relationship occurred, that communication between defendant and his attorney had ceased, or that there was any disagreement regarding defense strategy. Moreover, contrary to defendant's contention, the record supports the trial court's conclusion<sup>7</sup> that defense counsel was well-prepared and competent to represent defendant, that she presented a cogent and vigorous defense, and effectively cross-examined prosecution witnesses.

Although defendant claims that defense counsel failed to file motions or call witnesses on his behalf, defense counsel indicated on the record that she called the one witness that defendant asked her to call, and that, before she was assigned to defendant's case, a motion to suppress defendant's statement as well as other motions had been filed. (See Tr I, p 3; Tr II, p 6; Tr III, p 24.) Further, defendant does not specify what motions should have been filed, nor does he

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<sup>6</sup> We note that defendant "fired" his first attorney, and current counsel was assigned to the case approximately four months before trial. (See Tr II, p 5.)

<sup>7</sup> In response to defendant's general complaints after the verdict was rendered, the trial court commented as follows:

Let me make a comment.

And it may sound to you like I'm simply defending another member of the bar, but these are not hollow words that I speak. I thought that [defense counsel] did a terrific job.

I thought, because of the way she handled this case, that she really gave you a chance for an acquittal in this case.

And there's no doubt about her performance, in my mind. She was clearly prepared to proceed, and I have no further comment to make. [Tr III, pp 23-24.]

(See also Tr I, pp 3-4.)

identify the names of the alleged witnesses who were not called or the substance of their proposed testimony. “Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.” *Traylor, supra* at 464 (citation omitted). Moreover, defense counsel’s decisions concerning what motions to file and what witnesses to call are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), which do not support a finding of good cause for substitution. See *Traylor, supra* at 463. Accordingly, because defendant failed to show good cause justifying substitution of counsel, the trial court did not abuse its discretion by denying defendant’s request for new counsel.

Affirmed, but remanded for completion of a sentencing information report departure evaluation. We do not retain jurisdiction.

/s/ Bill Schuette  
/s/ William B. Murphy  
/s/ Richard A. Bandstra